IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-571289-D2 AND ALL OTHER SEAMAN DOCUMENTS

Issued to: Joseph Ransom Tucker, Jr.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1662

Joseph Ransom Tucker, Jr.

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 23 December 1966, an Examiner of the United States Coast Guard at Houston, Texas, suspended Appellant's seaman documents for 12 months outright plus 6 months on 18 months' probation upon finding him guilty of misconduct. The specifications allege that while serving as an able seaman on board the United States SS U. S. BUILDER, under authority of the document above described, (1) on or about 10 November 1966, Appellant wrongfully failed to perform his assigned duties between 1300 and 1700 hours by reason of being absent from the vessel while it was in a foreign port; (2) on or about 15 November 1966, Appellant wrongfully failed to perform his assigned duties between 0800 and 1700 hours by reason of being absent from the vessel while it was in a foreign port; (3) on or about 16 November 1966, Appellant wrongfully failed to perform his assigned duties between 0800 and 1700 hours by reason of being absent from the vessel while it was in a foreign port; (4) on or about 17 November 1966, Appellant wrongfully failed to perform his assigned duties by reason of being absent from the vessel while it was in a foreign port; (5) on or about 18 November 1966, Appellant wrongfully failed to perform his assigned duties between 0800 and 1600 hours while the vessel was in a foreign port; and (6) on or about 19 November 1966, Appellant wrongfully failed to perform his assigned duties between 0000 and 0400 hours, due to being in a state of intoxication, while the vessel was at sea.

At the hearing, Appellant elected to act as his own counsel. He entered pleas of not guilty to the allegations in the first and second specifications, guilty to the allegations in the third and fourth specifications, guilty to the allegtions in the fifthe specificaion, but only insofar as the failure to perform alleged therein relates to the period to time from 0800 to 1200 hours; and guilty to the allegations in the sixth specification, except to the extent that they relate to his having been intoxicated.

The Investigating Officer introduced in evidence certified copies of entries from the ship's Shipping Articles and its Official Logbook. The log entry concerning the offense alleged in the second specification was not properly made and the Examiner rejected it as proof of such offense. In defense, Appellant offered in evidence his own testimony.

at the end of the hearing, the Examiner rendered a written decision wherein he concluded that the first specification had been proved, that the second had not been proved, that the third and fourth had been proved by plea, that the fifth and sixth had been proved in part by plea, and that the charge had been proved. He then entered an order suspending all documents issued to appellant for a period of 12 months outright plus 6 months on 18 months' probation.

The entire decision was served on 29 December 1966. Appeal was timely filed on 18 January 1967.

FINDINGS OF FACT

On 10, 16, 17, 18, and 19 November 1966, Appellant was serving as an able seaman on board the United States SS U. S. BUILDER and acting under authority of his document while the ship was on a foreign voyage.

On 10 November 1966, while the ship was at Buckner Bay, Okinawa, Appellant failed to perform his regularly assigned duties between 1300 and 1700 hours; on 16 November 1966, while the ship was at Sasebo, Japan, Appellant failed to perform his regularly assigned duties between 0800 and 1700 hours; on 17 November 1966, while the ship was at Sasebo, Japan, Appellant failed to perform his regularly assigned duties; on 18 November 1966, while the ship was at Sasebo, Japan, Appellant failed to perform his regularly assigned duties between 0800 and 1200 hours; and on 19 November 1966, while the ship was at Sasebo, Japan, Appellant failed to perform his regularly assigned duties between 0000 and 0400 hours due to being intoxicated.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the Examiner's findings, that the second specification had not been proved and that the sixth specification had been proved in part by plea, are inconsistent with his statement at the hearing (page 17 of the transcript of testimony) that "I find the specifications proved, except 19 November specification [the sixth specification]". It is, therefore, requested that these two specifications be dismissed. It is also contended that the Examiner entered an erroneous plea to the offense alleged in the sixth specification; that the Examiner's findings on the fifth and sixth specifications are improper as there is no provision in the regulations permitting a finding that a specification has been proved in part by plea; and that the Examiner's finding on the first specification is not supported by substantial evidence.

APPEARANCE: Mandell and Wright, Attorneys at Law, Houston, Texas, by William L. Wood, Jr., Esq.

OPINION

Insofar as the motion to dismiss is directed to the second specification, it appears futile as this specification has been found not proved. However, it is so involved with the issue raised on appeal

in support of the motion to dismiss that it must of necessity be considered in connection with such issue.

As pointed out on appeal, there are certain inconsistencies in the decision of the Examiner. First of all, his conclusions that the second specification had not been proved and that the sixth specification had been proved are inconsistent with his conclusion at the hearing that all but the specification pertaining to 19 November (the sixth specification) had been proved. Secondly, his conclusions that the fifth and sixth specifications had only been partially proved is inconsistent with his findings of fact which indicate that he considered these two specifications to have been wholly proved.

In my opinion, the first mentioned inconsistency is the result of an inadvertent error, as there is no evidence to support a finding that the second specification has been proved and there is Appellant's guilty plea concerning the offense alleged in the sixth specification.

It is true that 46 CFR 137.20-160(a) provides that the prior record of a person charged may not be disclosed until the Examiner has made conclusions as to each charge and specification and then only if the Examiner concludes that at least one specification has been proved. Here, such conclusions of the Examiner were erroneous with respect to the second and sixth specifications and no conclusion regarding the charge was made prior to disclosure of Appellant's prior record. However, the primary purpose of the regulation noted above is to prevent consideration of a person's prior record in determining whether the charges and specifications filed against him have been proved. Inasmuch as the Examiner concluded that certain of the specifications had been proved, the purpose of the regulation has been served, irrespective of whether his conclusions on certain of the several specifications were erroneous. Thus, Appellant was not prejudiced in any material respect and I must conclude that the motion to dismiss be denied.

The second inconsistency noted above presents different problems. Appellant entered pleas of guilty to the offenses alleged in the fifth and sixth specifications, but took issue with certain facts alleged in connection therewith. Evidentiary facts alleged in connection with a specified offense ordinarily relate to the seriousness of the offense and, if such facts are not proved, the offense might still be proved. Where, as here, the commission of the offense is admitted, but the facts alleged in connection therewith are disputed, the Examiner should either (1) amend the specification so as to delete therefrom the evidentiary fact alleged if he desires to accept the plea of guilty, or (2) enter a plea of not guilty because of the indefinite nature of the plea. See 46 CFR 137.20-65 as to the first alternative and 46 CFR 137.20-75 as to the second. While neither alternative was resorted to here, the Examiner's intent is clear. On page 3 of his report, he states that the log entry concerning the failure to perform alleged in the sixth specification indicates that Appellant was intoxicated and he concludes that this constitutes a prima facie case as to appellant having been in such a state. There is no mention of Appellant having rebutted this and the only reasonable conclusion is that the Examiner intended to find the offense and fact proved.

As for the fifth specification, the Examiner initially accepted a plea of not guilty thereto, but

subsequently indicated that, to the extent this specification concerned a failure to perform between 0800 and 1200 hours, the plea should be one of guilty. The Examiner did not discuss the disputed fact, i.e., the time period involved, in his decision. All this indicates that he considered the specification as having been amended to conform with Appellant's version of the period of time involve. It is so considered here and the finding of fact made herein concerning the allegations in the fifth specification has been drafted accordingly.

The final matter raised on appeal is the contention that the Examiner's finding on the first specification is not supported by substantial evidence. However, it is the Examiner's responsibility to weight and balance conflicting evidence concerning a particular offense and his determination of the matter is ordinarily controlling. Here, the Examiner concluded that the log entry pertaining to the offense alleged in the first specification constituted a prima facie case which, in the Examiner's opinion, was not rebutted by the evidence offered by Appellant. There appears to be no reasonable basis for disturbing this conclusion.

Although I am in substantial agreement with the findings of the Examiner, I believe that his order is rather excessive in view of the type of offense involved and it will be modified so as to provide for the suspension of Appellant's documents for 8 months outright plus 6 months on 12 months' probation.

To the extent that the conclusions and findings of the Examiner are inconsistent with the conclusions and findings made herein, such conclusions and findings of the Examiner are hereby appropriately modified.

ORDER

The order of the Examiner dated at Houston, Texas, on 23 December 1966, is modified to provide for eight months outright suspension plus six months suspension on twelve months' probation. As so modified, the order is AFFIRMED.

W. J. Smith
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 5th day of October 1967.

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